Federal Court  Cour fédérale

Date: 20170929

Docket: IMM-1843-17

Citation: 2017 FC 867

Ottawa, Ontario, September 29, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

DWAYNE WINSTON GAYLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Dwayne Winston Gayle [the Applicant] pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision made by Senior Immigration Officer [the Officer], dated March 13, 2017, in which the Officer refused to grant the Applicant's claim for permanent residency on humanitarian and compassionate [H&C] grounds [H&C Application].

II. Background

A. *Preliminary Issue*

[2] The Style of Cause lists the Respondent as the Minister of Immigration, Refugees and Citizenship. Although this is the new name for this Minister and Department, the proper legal name for the Respondent before the Federal Court is the Minister of Citizenship and Immigration. Accordingly, the style of cause is hereby amended to change the Respondent to be "The Minister of Citizenship and Immigration".

[3] The Applicant is a citizen of Jamaica having been born in Jamaica on January 21, 1985.

[4] The Applicant came to Canada at the age of two with his mother Charmaine Gayle who was sponsored by the Applicant's father, Winston Gayle, on July 15, 1987, who was landed as a Permanent Resident of Canada and has been in Canada since that time.

[5] The Applicant grew up living with his father and his brother, as his mother left them due to addiction issues. Having grown up without a mother and having insufficient parental guidance, the Applicant, like his mother, also abused drugs and alcohol.

[6] The Applicant reconciled with his mother 12 years ago and now lives with her and his nephew Janoy Gayle (4 years old), who are both Canadian Citizens. The Applicant is currently seeking and obtaining treatment from the Centre for Addiction and Mental Health in Toronto.

[7] The Applicant has one son, Wesley Gayle, born in 2006, from a previous relationship with Deborah Grenier. At the time of his application, Wesley was residing with the Applicant as primary caregiver, although Wesley no longer resides with the Applicant. The Applicant states that he continues to have a close relationship to Wesley, being involved in his everyday life and providing financial and emotional support.

[8] The Applicant also has one daughter, Zaniah Gayle, born in 2014, from his ongoing relationship with Sheriece Jackson. The Applicant and Ms. Jackson are also expecting a second child. Ms. Jackson is his common-law partner and in her letter of support for the H&C Application she states that she is his fiancée. The Applicant states that they plan to live together, however he cannot do so at present as Ms. Jackson is in subsidised housing and they are hesitant to move in together in a new place for fear of the Applicant being removed from Canada and Ms. Jackson then being unable to afford rent in a non-subsidised location. Ms. Jackson also has two other daughters (ages 9 & 13) with whom the Applicant is close, as their father was removed to Jamaica.

[9] Although the Applicant and Ms. Jackson are living apart, the Applicant spends a great deal of time with his daughter and Ms. Jackson's two other daughters. The Applicant says he is their "father figure", that "they are dependent on [him]" and that he "provide[s] them with emotional and financial support".

[10] The Applicant has been employed as a car detailer at the Richmond Hill Toyota since November 11, 2015 and states that he is an active member of his church.

[11] The Applicant's grandmother who lived in Jamaica and passed away in 2012 was the only person in Jamaica upon whom he could have relied on for support in his reestablishment return to Jamaica.

[12] On September 12, 2012, the Applicant was convicted of assault causing bodily harm and sentenced to 1 day of jail, 139 days of pre-sentence custody, a 2 year probation order, a DNA order as a primary offence, and a 10 year prohibition/seizure order.

[13] The offence involved Ms. Jackson (the mother of his second child) resulting in her losing her front teeth. There is disagreement with what actually occurred, what was plead to in court, and what was in the police report. Ms. Jackson testified before the Immigration Appeal Division [IAD] hearing stating that she fell and knocked them out on the table, while the Applicant said it had been his hand (in self-defence) at the IAD, and his elbow (accidentally) in earlier written submissions. At the IAD, the tribunal member accepted the police report evidence (that the Applicant knocked her teeth out with one hard hit to the mouth because she had asked him to pack up and not stay there, and that he had also choked and slapped her) over the testimony of the Applicant and his witness.

[14] Prior to this offence the Applicant had a lengthy record of six convictions, including flight and theft over $5000; assault, break and enter and theft, failure to comply with an undertaking and resisting, and obstructing an officer and failure to comply with recognisance.

[15] As a result of his 2012 assault causing bodily harm conviction, the Applicant was reported under section 44(1) of the IRPA on November 6, 2012, and on March 16, 2013, his case was reviewed by Canada Boarder Services Agency and recommended for an admissibility hearing. The case was then referred under section 44(2) of the IRPA to the Immigration Division [ID] and an oral admissibility hearing occurred on May 14, 2013, after which a removal order was granted against the Applicant as he was found inadmissible under section 36(1)(a) of the IRPA.

[16] The Applicant appealed this removal order to the IAD and was represented by counsel at the hearing (on September 28, 2015 and January 21, 2016).

[17] At the IAD hearing, the Applicant's counsel did not challenge the validity of the removal order but made submissions that the Applicant should be permitted to stay in Canada for H&C grounds, including the best interests of his children [BIOC]. On February 29, 2016, the IAD's decision held that the Applicant had not established sufficient H&C considerations, also taking into account the BIOC, to warrant special relief. As part of this decision, the tribunal member considered the following:

- The seriousness of the Applicant's past offences and possibility of rehabilitation (finding that the Applicant downplays and minimizes his responsibility);
- The establishment of the Applicant in Canada (finding that this was a neutral factor as although he had been in Canada a very long time he had given insufficient evidence of employment etc.);
- The potential hardship faced on return to Jamaica (finding that this was a neutral factor as although there may be gun violence and "he would miss his children" the tribunal member did not find sufficient evidence to support a lack of community assistance and stated the dislocation would be "no greater than any long-term resident of Canada making such a move");
- Family ties to Canada (finding that this did not favour the Applicant as his parents did not provide supporting letters or act as witnesses, that he was living with family members

when he committed some of the criminal offences, and that there was insufficient evidence that his mother, children or girlfriend were dependent on him);
- BIOC (finding that "it is not in his children's best interest to be exposed to his behaviour or to establish a closer bond with their father only to have him imprisoned for future criminal offences and/or be removed from Canada" and "that the greater interests of Canadians for safety must trump the best interests of a child in this case").

[18] As a result, the IAD upheld the removal order and the IAD Decision was not appealed.

[19] The Applicant also submitted a request for a Pre-Removal Risk Assessment [PRRA], which was refused. That decision was also not appealed.

[20] While the PRRA decision was not included in the Certified Tribunal Record [CTR], the Officer specifically references the reasons from the PRRA as the basis for refusing one of the Applicant's arguments, that due to relatives who had been killed in Jamaica in violent past attacks, he is at risk and will experience hardship on return to Jamaica.

[21] After the IAD Decision, the Applicant's representative filed an application based on H&C grounds on April 28, 2016. It is the decision on this H&C Application that is under review.

[22] The Officer considered the Applicant's family members/dependants, being the Applicant's father and mother, the Applicant's two children and the Applicant's brother. The Officer found that the factors to be considered in the H&C, as expressed by the Applicant, were degree of establishment, BIOC and hardship of returning to Jamaica.

(1) Establishment

[23] Letters of support from the Applicant's parents, his cousin Karaine, his son Wesley, the mother of his first child, the mother of his youngest child, and his Pastor were considered.

[24] The Officer acknowledged that the Applicant has attained a level of establishment through education, employment, and friends and considered these as positive factors. The Officer found that the although the Applicant has family in Canada, his mother's letter of support focuses on the Applicant's past and concerns about his future if returned to Jamaica and does not detail the nature of their relationship. For this reason, the Officer was not satisfied that the relationships in Canada are sufficiently close in nature and that the relationships could continue by other methods (telephone, mail and electronically) if he were to return to Jamaica.

(2) Best Interests of the Child [BIOC]

[25] The Officer noted that although the Applicant has his son Wesley's address as his own on the application, the Applicant only provided a copy of an not completely filled out letter he says he submitted to the school and no proof from the school or from Wesley's mother, whose letter made no mention of Wesley living with his father. The letter was recognised by the Officer to show that the Applicant assists in picking up Wesley from school and providing medications, shoes, groceries and clothes for Wesley. The Officer also noted Wesley's letter and "acknowledge[s] that Wesley loves his father and does not want to see him leave".

[26] Little evidence was provided with respect to the Applicant's daughter, to show the extent of the Applicant's involvement in her life other than that he plays some part. The Officer did note that a letter from Ms. Jackson mentions that the Applicant provides his daughter, and her step-sisters, transportation to school, preparing meals, assisting with homework and acting as a father figure. The Officer then appears to discount the letter, as Ms. Jackson calls herself a fiancée in one part and a single-mother in another part, as well as confirming that they do not live together.

[27] The Officer found that although the Applicant plays "some role" in the children's lives, the evidence presented is insufficient to show the extent of this role.

[28] The Officer also held there was little information provided to show that other mediums of communication (phone, mail, email) would not allow the Applicant and his family in Canada to remain in contact and maintain a relationship if returned to Jamaica.

[29] The Officer did accept that the Applicant loves his children and that both the Applicant and the children will experience emotional hardship if separated.

(3) Risk and Adverse Country Conditions

[30] The Applicant raised the same risk in this H&C application as he did in his PRRA, namely the murder of three family members in Jamaica. As the Officer was the same officer who refused the PRRA, the Officer found, as he did in the PRRA, that although Jamaica has high crime and gang violence rates there was little objective evidence of the Applicant being targeted

due to his familial relationship to the murdered men. For this reason, the Officer did not consider this a hardship.

[31] The Officer also did not accept that the Applicant will face hardship through widespread unemployment or lack of assistance in survival, solely due to him not having connections in Jamaica. His work experience in Canada would assist him in finding work on return to Jamaica.

(4) Other Considerations

[32] The Officer also noted the history of convictions the Applicant has as both a youth and adult, and the fact that the IAD found the Applicant did not take responsibility for his actions and instead minimized his culpability.

(5) Overall Decision

[33] Having considered the above issues, the Officer, although noting the love between the Applicant and his children and that he provides “some level of care”, found that the BIOC was not sufficient on its own to warrant the exercise of an H&C exemption, given the Applicant’s past criminal activity.

[34] The Officer also accepted that although there will be a period of economic and social adjustment for the Applicant on return to Jamaica which may lead to some hardship, such hardship does not rise to the level where an H&C exemption is warranted.

[35] For these reasons, the Officer refused the H&C Application on March 13, 2017.

III. Issues

[36] The issues are:

A. Was the Officer's BIOC analysis reasonable?

B. Was the Officer's assessment of potential hardship on return to Jamaica, family ties and the Applicant's criminality reasonable?

IV. Standard of Review

[37] The standard of review of an Officer's decision to refuse the Applicant's H&C application is reasonableness.

V. Analysis

A. *Preliminary Issue*

[38] The Respondent correctly points out that the proper Respondent shall be the Minister of Citizenship and Immigration and the style of cause is hereby amended to name the Respondent as the Minister of Citizenship and Immigration effective immediately.

B. *Was the Officer's BIOC analysis reasonable?*

[39] Section 25 of the IRPA authorizes the Minister to facilitate an individual's admission to Canada or exempt an individual from any applicable criteria or obligation under the IRPA, where

the Minister is satisfied that such exemption or facilitation is justified given humanitarian or compassionate considerations.

[40] An H&C review entails consideration of special and additional circumstances to provide an exemption from Canadian immigration laws which would otherwise be applied. That remains the case after the Supreme Court of Canada decision in *Kanthasamy* (*Liang v Canada (MCI),* 2017 FC 287 (*Liang*); *Kanthasamy v Canada (MCI),* 2015 SCC 61 at para 41 (*Kanthasamy*)).

[41] The Applicant submits the Officer used the wrong test and that although the Officer did not use the exact words of "undue, undeserved or disproportionate hardship," it was a hardship test the Officer undertook instead of a best interests test. When one purposively construes the reasoning of the majority decision in *Kanthasamy*, it is equitable relief in light of the substantive consideration and weighing of all the relevant facts and factors before the decision maker (*Kanthasamy*, at paras 21, 25). The Court should consider the *Chirwa* test as co-extensive with the Guidelines (*Kanthasamy*, at paras 30-31).

[42] The Applicant also states the Officer ignored or misconstrued evidence, as although there were letters from the Applicant's son, and the mothers of both of the Applicant's children, the Officer, in recognising that "the [A]pplicant plays "some role" in their lives, [stated that] the extent of that role has not been demonstrated though the submissions presented".

[43] Finally, the Applicant also submits that the Officer both minimized the BIOC and was not alert, alive, and sensitive to the children's interests. The Applicant argues that the evidence

clearly demonstrated the Applicant had a very close relationship with the children and all the Officer did was pay “lip service” to the BIOC.

[44] I find that the Officer’s reasons show that the Officer did not apply the unusual, undeserved or disproportionate hardship test, contrary to the Applicant’s assertion, but rather did consider hardship as required. Moreover, the Officer did not minimize the children’s interests or misunderstand or ignore the evidence considered with respect to the children. So long as an officer appropriately appreciates the child’s circumstances as a whole and gives significant weight to the best interests of the child, the H&C decision will be reasonable (*Kanthasamy*, at paras 41, 60).

[45] The case of *Liang*, above, aptly review, the impact of the Supreme Court’s decision in *Kanthasamy*:

> **24** In *Kanthasamy*, the Supreme Court of Canada summarized the principles that are to guide an Officer's discretion in granting an H&C application. It also stated that there will inevitably be some hardship associated with being required to leave Canada, however, this alone will generally not be sufficient to warrant relief on H&C grounds (at para 23). What will warrant relief under s 25(1) will vary depending on the facts and context of each case and officers making such decisions must substantively consider and weigh all of the relevant facts and factors before them (*Kanthasamy* at paras 25 and 33; also see *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 33). The Supreme Court of Canada also revisited the best interests of the child analysis required by s 25(1) finding that officers must be alert, alive and sensitive to the best interest of the child, afford them significant weight, examine them in light of all of the evidence, and take into account the context of the child's personal circumstances (*Kanthasamy* at paras 23-27 and 35-39).
>
> **25** In this matter, the Applicants primarily take issue with the Officer's H&C analysis on the basis that the Officer did not take into consideration the impact that the pending re-determination by

> the RPD of the Female Applicant's claim will have on the hardship analysis. In that regard, they submit that *Kanthasamy* is significant because it imposes a broader test, in that all relevant factors must be considered by an H&C officer, and the outstanding RPD re-determination was such a factor. Further, because the *Kanthasamy* best interest of the child analysis confirms that there should be no hardship to children.
>
> **26** On the latter point, I do not agree with the Applicants that *Kanthasamy* stands for the proposition that the analysis of hardship does not form part of the best interest of the child analysis or that any degree of hardship to a child would necessitate a positive H&C determination. In *Estaphane v Canada (Citizenship and Immigration)*, 2016 FC 851, Justice Southcott stated that *Kanthasamy* prohibits employing the threshold of "unusual and undeserved hardship" in considering the best interests of a child, in effect, thereby requiring demonstration that the hardship imposed on a child reaches a certain level. However, that *Kanthasamy* does not prohibit consideration of hardship that a child may face as a result of circumstances under consideration. In fact, often such hardship that is argued by an applicant to support a particular result being in the best interests of a child (at para 34).
>
> [Emphasis added]
>
> See also *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2017 FC 27 (*Nguyen*) at paras 27-28; *Zlotosz v Canada (Minister of Citizenship and Immigration)*, 2017 FC 724 at paras 20-21).

[46] Moreover, the Officer considered the Applicant’s involvement with the children as set out in the letters and submissions on the record. It is not the Court’s role to reweigh the evidence. The Officer did not discount that evidence and found that there was insufficient evidence to conclude that the best interests of the children were such that the application should be granted, notwithstanding the relevant other factors, including the Applicant’s criminality.

[47] I also find that the Officer did not minimize the children’s interest when he found that little evidence had been presented to indicate that his relationship with the children would

terminate upon his departure or that he would not be able to maintain telephone, mail and internet contact with his children and continue to further their relationship. While it is certainly not ideal to have a long distance relationship with a child at any time or for any reason, the inherent hardship that results was reasonably considered by the Officer.

[48] The question for the Court is whether the officer is alert, alive and sensitive to the child's best interests. In this case, the Officer addressed the concerns and information put forward by the Applicant and was alert, alive and sensitive to the best interests. The Officer's decision was reasonable (*Nguyen*, above at paras 22-25).

C. *Was the Officer's assessment of potential hardship on return to Jamaica, family ties and the Applicant's criminality reasonable?*

[49] The Applicant argues that the Officer erred by holding that she would not be considering the same risk as presented in the PRRA, when the Officer should have nevertheless considered the potential hardship of Jamaica's violence and discrimination towards someone who would be considered a foreigner.

[50] The Applicant also argues that the Officer ignored evidence of the Applicant's ties to his adult family in Canada.

[51] Finally, the Applicant submits that the Officer unreasonably fettered her discretion by relying on the IAD Decision in regards to the Applicant's criminality and what occurred as part of the offence that rendered him inadmissible.

[52] The onus is on the Applicant to squarely raise the alleged hardship issues and concerns in returning to Jamaica (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38).

[53] No submissions were made about levels of discrimination or country condition documentation to support what the Applicant tries to argue should now be considered. The Officer reasonably considered the lack of family ties, unemployment, economic concerns and the separation of the Applicant from his children, as well as deaths on his family due to violence. Reasonable consideration was also reflected in the Officer's review of the Applicant's family ties in Canada and support for his fiancée and children.

[54] With respect to criminality of the Applicant, I also find that the Officer properly and reasonably considered the Applicant's lengthy criminal record and lack of remorse. In effect, the Applicant seeks to have the Court reweigh the evidence before the Officer, which is not role of the Court.

JUDGMENT in IMM-1843-17

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to change the Respondent to "The Minister of Citizenship and Immigration";
2. The application is dismissed;
3. No question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1843-17
STYLE OF CAUSE:	DWAYNE WINSTON GAYLE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 25, 2017
JUDGMENT AND REASONS:	MANSON J.
DATED:	SEPTEMBER 29, 2017

APPEARANCES:

Robin L. Seligman	FOR THE APPLICANT
David Joseph	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robin L. Seligman Professional Corporation Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
The Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT